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6 **UNITED STATES DISTRICT COURT**
7 **SOUTHERN DISTRICT OF CALIFORNIA**
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9 CORVETTE B. ROBINSON
10 CDCR #J-81217

11 Plaintiff,

12 vs.
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14 M. L. HARRIS,
15

16 Defendant.
17
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Civil No. 13-cv-0091 H (KSC)

ORDER:

**(1) GRANTING PLAINTIFF'S
MOTION TO PROCEED IN
FORMA PAUPERIS, IMPOSING
NO INITIAL PARTIAL FILING
FEE, GARNISHING \$350.00
BALANCE FROM PRISONER'S
TRUST ACCOUNT; AND**

**(2) DISMISSING COMPLAINT
FOR FAILURE TO STATE A
CLAIM PURSUANT TO 28
U.S.C. §§ 1915(e)(2) AND 1915A(b)**

19 Corvette B. Robinson ("Plaintiff"), a state inmate currently incarcerated at the
20 Richard J. Donovan Correctional Facility located in San Diego, California, and
21 proceeding pro se, has submitted a civil action pursuant to 42 U.S.C. § 1983. Plaintiff
22 has also filed a certified copy of his inmate trust account statement which the Court
23 liberally construes as Plaintiff's Motion to Proceed *In Forma Pauperis* ("IFP") pursuant
24 to 28 U.S.C. § 1915(a).

25 **I. Motion to Proceed IFP**

26 All parties instituting any civil action, suit or proceeding in a district court of the
27 United States, except an application for writ of habeas corpus, must pay a filing fee of
28 \$350. See 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to

1 prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28
2 U.S.C. § 1915(a). See Rodriguez v. Cook, 169 F.3d 1176, 1177 (9th Cir. 1999).
3 Prisoners granted leave to proceed IFP remain obligated to pay the entire fee in
4 installments, regardless of whether their action is ultimately dismissed. See 28 U.S.C.
5 § 1915(b)(1) & (2); Taylor v. Delatoore, 281 F.3d 844, 847 (9th Cir. 2002).

6 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
7 (“PLRA”), a prisoner seeking leave to proceed IFP must submit a “certified copy of the
8 trust fund account statement (or institutional equivalent) for the prisoner for the six-
9 month period immediately preceding the filing of the complaint.” 28 U.S.C. §
10 1915(a)(2); Andrews v. King, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
11 trust account statement, the Court must assess an initial payment of 20% of (a) the
12 average monthly deposits in the account for the past six months, or (b) the average
13 monthly balance in the account for the past six months, whichever is greater, unless the
14 prisoner has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
15 institution having custody of the prisoner must collect subsequent payments, assessed at
16 20% of the preceding month’s income, in any month in which the prisoner’s account
17 exceeds \$10, and forward those payments to the Court until the entire filing fee is paid.
18 See 28 U.S.C. § 1915(b)(2).

19 The Court finds that Plaintiff has no available funds from which to pay filing fees
20 at this time. See 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner
21 be prohibited from bringing a civil action or appealing a civil action or criminal judgment
22 for the reason that the prisoner has no assets and no means by which to pay the initial
23 partial filing fee.”); Taylor, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as
24 a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure
25 to pay . . . due to the lack of funds available to him when payment is ordered.”).
26 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP and assesses no initial
27 partial filing fee per 28 U.S.C. § 1915(b)(1). The entire \$350 balance of the filing fees
28 mandated shall be collected and forwarded to the Clerk of the Court pursuant to the

1 installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

2 **II. Initial Screening per 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)**

3 Notwithstanding IFP status or the payment of any partial filing fees, the Court must
 4 subject each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory
 5 screening and order the sua sponte dismissal of any case it finds “frivolous, malicious,
 6 failing to state a claim upon which relief may be granted, or seeking monetary relief from
 7 a defendant immune from such relief.” 28 U.S.C. § 1915(e)(2)(B); Calhoun v. Stahl, 254
 8 F.3d 845, 845 (9th Cir. 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not
 9 limited to prisoners.”); Lopez v. Smith, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
 10 (noting that 28 U.S.C. § 1915(e) “not only permits but requires” the court to sua sponte
 11 dismiss an *in forma pauperis* complaint that fails to state a claim).

12 Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua
 13 sponte dismissal of only frivolous and malicious claims. Lopez, 203 F.3d at 1130. As
 14 amended, 28 U.S.C. § 1915(e)(2) mandates that the court reviewing an action filed
 15 pursuant to the IFP provisions of section 1915 make and rule on its own motion to
 16 dismiss before directing the U.S. Marshal to effect service pursuant to Federal Rule of
 17 Civil Procedure 4(c)(3). See Calhoun, 254 F.3d at 845; Lopez, 203 F.3d at 1127; see also
 18 McGore v. Wrigglesworth, 114 F.3d 601, 604-05 (6th Cir. 1997) (stating that sua sponte
 19 screening pursuant to § 1915 should occur “before service of process is made on the
 20 opposing parties”).

21 To survive a motion to dismiss, a complaint “must contain sufficient factual matter,
 22 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,
 23 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570
 24 (2007)); Barren, 152 F.3d at 1194 (noting that § 1915(e)(2) “parallels the language of
 25 Federal Rule of Civil Procedure 12(b)(6)”). “A claim has facial plausibility when the
 26 plaintiff pleads factual content that allows the court to draw the reasonable inference that
 27 the defendant is liable for the misconduct alleged.” Id. “Threadbare recitals of the
 28 elements of a cause of action, supported by mere conclusory statements, do not suffice.”

1 Iqbal, 556 U.S. at 678. District courts have a duty to liberally construe a pro se's
2 pleadings, see Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir.
3 1988), which is "particularly important in civil rights cases." Ferdik v. Bonzelet, 963
4 F.2d 1258, 1261 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights
5 complaint, however, the court may not "supply essential elements of claims that were not
6 initially pled." Ivey v. Board of Regents of the University of Alaska, 673 F.2d 266, 268
7 (9th Cir. 1982).

8 Here, Plaintiff alleges that Defendant Harris was the correctional officer assigned
9 to the food serving line on November 22, 2011. (See Compl. at 3.) On that day, Plaintiff
10 alleges that Defendant Harris accused him of trying to get a second meal and cursed at
11 Plaintiff. (Id.) Plaintiff alleges that Defendant Harris then grabbed a handful of "hot
12 potato tots" and "threw them through the food service window and hit [Plaintiff] in the
13 face and eyes with this 'hot food substance.'" (Id.) Plaintiff alleges that he suffered
14 facial burns and an eye injury. (Id.)

15 Any physical application of force against a person in custody, whether it be
16 through brute strength, chemical or other weaponry, or mechanical restraint, may not be
17 excessive. See Whitley v. Albers, 475 U.S. 312 (1986) (prison shooting); Hudson v.
18 McMillian, 503 U.S. 1 (1992) (prison beating); LeMaire v. Maass, 12 F.3d 1444, 1450-
19 53, 1457, 1460 (9th Cir. 1993) (prison's use of in-shower and in-cell leg and waist
20 restraints). "That is not to say that every malevolent touch by a prison guard gives rise
21 to a federal cause of action." Hudson, 503 U.S. at 10 (citing Johnson v. Glick, 481 F.2d
22 1028, 1033 (2d Cir. 1973) ("Not every push or shove, even if it may later seem
23 unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional
24 rights"). In order to violate the Eighth Amendment, the Defendant must use force which
25 is "unnecessary" and "wanton." Whitley, 475 U.S. at 319. "It is obduracy and
26 wantonness, not inadvertence or error in good faith, that characterize the conduct
27 prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs
28 in connection with establishing conditions of confinement, supplying medical needs, or

restoring official control over a tumultuous cellblock.” Id.

Thus, a constitutional violation can only be established if force was used “maliciously and sadistically for the purpose of causing harm.” Id.; see also Wilson v. Seiter, 501 U.S. 294, 298 (1991) (claims that an official has inflicted cruel and unusual punishment contain both an objective component as well as a subjective “inquiry into the prison official’s state of mind”). The Supreme Court has also clearly stated that the Eighth Amendment’s prohibition of cruel and unusual punishment necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not the sort “repugnant to the conscience of mankind.” Hudson, 503 U.S. at 10. A use of force is *de minimis* if it results in no discernible injury. See Wilkins v. Gaddy, 559 U.S. 34, 130 S. Ct. 1175, 1178 (2010).

Here, Plaintiff’s claims fail to rise to the level of an Eighth Amendment violation. Plaintiff’s allegations are insufficient to show that Defendant’s alleged use of force was used “maliciously and sadistically for the purpose of causing harm.” Whitley, 475 U.S. at 319. Further, Plaintiff’s vague allegations of facial burns and eye injuries caused by “hot potato tots” are insufficient to support a reasonable inference that Plaintiff suffered a discernible injury, Iqbal, 556 U.S. at 678, nor is throwing a handful of food “repugnant to the conscience of mankind.” Hudson, 530 U.S. at 10. Accordingly, Plaintiff’s Complaint must be dismissed for failing to state a claim upon which relief may be granted.

III. Conclusion and Order

Good cause appearing, **IT IS HEREBY ORDERED** that:

1. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) is **GRANTED**.

2. The Secretary of California Department of Corrections and Rehabilitation, or his designee, shall collect from Plaintiff’s prison trust account the \$350 balance of the filing fee owed in this case by collecting monthly payments from the account in an amount equal to twenty percent (20%) of the preceding month’s income and forward

1 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in
2 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY
3 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

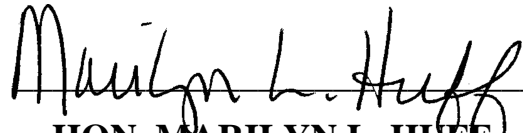
4 3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey
5 A. Beard, Ph.D., Secretary, California Department of Corrections and Rehabilitation,
6 1515 S Street, Suite 502, Sacramento, California 95814.

7 **IT IS FURTHER ORDERED** that:

8 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28
9 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). The Court **GRANTS** Plaintiff forty five (45)
10 days leave from the date this Order is "Filed" in which to file a First Amended Complaint
11 which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint
12 must be complete in itself without reference to the superseded pleading. See S.D. Cal.
13 Civ. L. R. 15.1. Defendants not named and all claims not re-alleged in the Amended
14 Complaint will be deemed to have been waived. See *King v. Atiyeh*, 814 F.2d 565, 567
15 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint fails to state a claim upon
16 which relief may be granted, it may be dismissed without further leave to amend and
17 may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). See *McHenry v.*
18 *Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

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20 **IT IS SO ORDERED.**

21 DATED: February 25, 2013

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23 **HON. MARILYN L. HUFF**
24 United States District Judge
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